

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MATTHEW LIES,

Defendant-Appellant.

UNPUBLISHED

March 24, 2000

No. 204717

Recorder's Court

LC No. 96-503672

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree home invasion, MCL 750.110a; MSA 28.305(a), two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) (sexual penetration during the commission of a felony), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(c); MSA 28.788(3)(1)(c) (sexual contact during the commission of a felony), and unarmed robbery, MCL 750.530; MSA 28.798. Defendant was sentenced to one to twenty years' imprisonment for the first-degree home invasion conviction, life imprisonment for one of the first-degree criminal sexual conduct convictions, twenty-five to fifty years' imprisonment for the other first-degree criminal sexual conduct conviction, five to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction, and one to fifteen years' imprisonment for the unarmed robbery conviction. We affirm defendant's convictions but remand for resentencing.

Defendant first argues that the trial court abused its discretion in admitting hearsay testimony in lieu of the victim's testimony at trial. Defendant also claims that defense counsel's failure to object to the testimony rendered counsel ineffective. We disagree. Admissibility of evidence is generally a matter within the discretion of the trial court. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must have prejudiced the defendant. *People v Pickens*, 446 Mich

298, 314; 521 NW2d 797 (1994); *Daniel, supra*, 207 Mich App 58. A defendant must demonstrate that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). In addition, defendant has the burden of overcoming the presumption that the challenged conduct was sound trial strategy. *Daniel, supra*, 207 Mich App 58. Effective assistance of counsel is presumed. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989).

The victim's statements to police officers following her attack were properly admitted as excited utterances pursuant to MRE 803(2). Under this exception, it does not matter whether the declarant is available or unavailable to testify. Both officers testified that the victim was highly emotional and distraught and she clearly appeared to be under the continued stress of the attack. Officer Alsip spoke with the victim immediately following the attack and Officer Donohue spoke with her only three hours after the attack while the victim was in the hospital. Her statements were not the result of probative or suggestive questioning by the officers, but were made while the stress of the attack was still fresh in the victim's mind. There was simply no evidence that the victim had the ability to reflectively think of her statements to the police or that she had the opportunity to fabricate her responses to the officers' questions. See *People v Smith*, 456 Mich 543; 581 NW2d 654 (1998); *People v Straight*, 430 Mich 418; 424 NW2d 257 (1988); *People v Crump*, 216 Mich App 210; 549 NW2d 36 (1996).

As for the victim's statement to Dr. Fertel, the statement was properly admitted as a statement made for medical diagnosis and/or treatment pursuant to MRE 803(4). Once again, the declarant's availability is of no consequence. There is simply no reason proffered by defendant which would justify exclusion of Fertel's testimony. Fertel testified that the victim told hospital personnel and himself that someone had broken into her house through her basement window, filled her bathtub and threatened to drown her if she did not do what he said. The man knelt on her chest and attempted vaginal penetration. He then turned her over and attempted anal penetration. The victim's statements were necessary in order for the medical personnel to be able to conduct a proper examination. MRE 803(4). After all, the victim complained of chest pain and sexual assault, and such information was crucial to her medical examination.

Defendant argues that he was denied the effective assistance of counsel at trial where counsel failed to object to the admission of each of the three foregoing statements. However, as the statements were properly admitted under certain exceptions to the hearsay rule, counsel was not required to make meritless objections. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). In addition, it should be noted that defense counsel *did* object to the admission of the evidence during the prosecution's motion in limine.

Defendant also argues that the trial court erred in instructing the jury on flight. We disagree. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error, and even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Jury instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses and theories for which there is evidence in support. *Id.*

In order to give a particular instruction, there must be evidence from the record to support the giving of the instruction. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989); *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). There was evidence presented at trial which warranted giving the flight instruction. Defendant's friend, Matt Howell, testified that defendant came over to his house in the later morning hours the day the crime was committed. The police pulled up to Howell's home and questioned Howell about a burglary. Howell went inside and told defendant that the police were there, but defendant never came out of the house. When Howell and the officers went inside to see defendant, he was gone. The window in the room in which defendant was last seen was left open. The jury could have inferred that defendant left Howell's home out the window and could have used the evidence, not as substantive evidence of defendant's guilt, but as evidence of defendant's state of mind. See *People v Kraai*, 92 Mich App 398, 409; 285 NW2d 309 (1979). Additionally, another of defendant's friends, William Tesnow, testified that defendant came over to his house and asked to be hidden. This further supports the fact that defendant fled Howell's house in order to evade the officers. Therefore, because the evidence supported the instruction, the trial court did not err in instructing the jury on flight.

Finally, defendant argues that he is entitled to resentencing where the court failed to articulate its reasons for deviating from the sentencing guidelines. We agree. There was more than one procedural error at sentencing which leads us to conclude that the trial court was functioning under a misconception of the law or a mistake of fact. The Sentencing Information Report clearly indicated that the sentencing guidelines range for first-degree criminal sexual conduct in this case was eight to twenty years' imprisonment. The court never stated on the record what the guidelines range was, nor did it explain its reasons for deviating from the guidelines. Instead, it appears that the court adopted the prosecution's statement that the range was ten to twenty-five years' imprisonment. That statement was erroneous. It cannot be said that the court's failure to articulate its reasons for the deviation was harmless where the record reflects that the court may have been unaware of the proper guidelines in the first instance. *People v Kreger*, 214 Mich App 549, 555; 543 NW2d 55 (1995). As such, the matter is remanded for resentencing so that the court can state its reasons for the departure on the record, or so that the court may remedy its misunderstanding of the guidelines range applicable to this case. See *People v Triplett*, 432 Mich 568, 569; 442 NW2d 622 (1989).

Affirmed and remanded for resentencing. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry W. Saad